In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA, *Plaintiff in Error,* vs. J. J. MATTHEWS and MAUDE K. MATTHEWS, Husband and Wife, *Defendants in Error.*	No. 3697

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT

Plaintiff in error in its complaint alleges that the defendants in error are husband and wife, engaged as a firm in a community business of dealing in timber products, and that on November 27, 1918, acting by and through its agent or governmental department, the Emergency Fleet Corporation, the plaintiff in error paid to the said defendants in error the sum of $2508.78 which payment was made through error and mistake and was without valuable or any other consideration. Defendants in

error demurred to said complaint, upon the following grounds:

1. That there is a defect in parties plaintiff.

2. That said action was not commenced within the time limited by law.

3. That the same does not state facts sufficient to constitute a cause of action.

Thereafter the court filed its memorandum opinion, which is as follows:

> "The complaint alleges that the defendants, husband and wife, were engaged as a firm in a community business, dealing in timber products; that the plaintiff, the United States, through its agent, the Emergency Fleet Corporation, through error and mistake, paid certain money to such firm.
>
> "The Shipping Board Act of September 7, 1916, created a Board of five commissioners, to be appointed by the President, by and with the consent of the Senate. This Act (by section 8146-f [U. S. Comp. Stat. Ann.]), provided that the Board, in its judgment, might form, under the laws of the District of Columbia, one or more corporations for acquiring and operating merchant vessels. The Board was authorized by the Act to subscribe for the (6) stock of such corporations. The Emergency Fleet Corporation was organized by the Board under this Act and the laws of the District

of Columbia and it subscribed for the entire stock of the corporation.

"The incorporation act of the District of Columbia provides that, when the certificate of incorporation is filed, the persons signing and acknowledging the certificate shall, by the name in the certificate, be capable of suing and being sued in courts of law and equity.

"Defendants demur to the complaint upon the grounds:

"1. That there is a defect in parties plaintiff.

"2. That said action was not commenced within the time limited by law.

"3. That same does not state facts sufficient to constitute a cause of action.

"From the terms of the Shipping Board Act and the incorporation act of the District of Columbia, I am of the opinion that an intention is shown on the part of Congress that suits by the Emergency Fleet Corporation should be brought in its own name; that the discretion or authority to prosecute suits otherwise does not reside elsewhere. It is not true that attributes of sovereignty inhering in Government establishments are lost, unless the suits are prosecuted in the name of the sovereign.

"*Ballaine v. Alaska Northern Ry. Co.*, 259 Fed. 183.

"Demurrer sustained on the first ground. No ruling on the other grounds." (Tr. pp. 6-8.)

Plaintiff in error filed its petition for re-hearing as follows:

> "Comes now the plaintiff and respectfully petitions this court for a reargument and a reconsideration of defendant's demurrer, for the reason and upon the ground that the court in its memorandum decision, filed March 14, 1921, sustaining defendants' demurrer, based its decision on the Shipping Act of 1916 (Sec. 8146-f, U. S. Comp. Stat. Ann.), while the Merchant Marine Act 1920, an act of Congress passed June 5, 1920, repealed the Act creating the Emergency Fleet Corporation, and assigned all the contracts, agreements, rights, interests, and remedies of the Emergency Fleet Corporation to the United States Shipping Board, which is a United States Government administrative body." (Tr. pp. 8-9.)

This petition came on for hearing on April 18, 1921, and was denied.

JUDGMENT.

> "Be it remembered that this matter came on heretofore and on the 7th day of March, 1921, duly and regularly for hearing upon the demurrer of the defendants to the complaint of the plaintiff, the plaintiff appearing by F. C. Reagan, Assistant United States Attorney, and the defendants by their attorneys, Weter & Roberts, and the matter being duly presented to the court by the attorneys for the respective

parties, and the court having considered said demurrer and finding that there was a defect in parties plaintiff and that said demurrer was well taken and should be sustained, directs that the demurrer so filed by the defendants to the complaint of the plaintiff be sustained.

"And the plaintiff subsequent thereto having filed its petition for reargument and said petition having heretofore come on for hearing on the 18th day of April, 1921, duly and regularly for hearing, and the court having considered said petition denied the same.

"And the plaintiff subsequent thereto having failed to amend its complaint or to present any further, other or additional applications for a reconsideration of the order so made by the court sustaining said demurrer, and the plaintiff electing to stand upon its complaint, and refusing to plead further,—

"Now, then, upon motion of the defendants for judgment, it is by the court ORDERED, ADJUDGED and DECREED that the plaintiff take nothing by reason of its alleged cause of action herein as against the defendants, and that this action as against the defendants be and it is hereby dismissed, and that the defendants go hence without day and have and recover of and from the plaintiff their costs and disbursements herein to be taxed; to all of which the plaintiff has excepted and an exception is allowed." (Tr. pp. 10-11.)

Plaintiff in error prosecutes this appeal from this judgment.

"ASSIGNMENT OF ERRORS.

"Comes now the plaintiff, United States of America, by and through Robert C. Saunders, United States District Attorney, and files the following assignment of errors upon which he will rely upon his appeal from the judgment made by this Honorable Court on the 17th day of May, 1921, in the above entitled cause:

"I.

"That the United States District Court for the Western District of Washington, Northern Division, erred in sustaining the demurrer of the defendants to the complaint of the plaintiff herein.

"II.

"That said District Court erred in dismissing said action." (Tr. pp. 13-14.)

ARGUMENT.

A reading of the opinion of the trial court discloses the fact that the demurrer to the complaint was sustained on the ground that there was a defect in the parties plaintiff; the court saying:

> "From the terms of the Shipping Board Act and the incorporation act of the District of Columbia, I am of the opinion that an intention is shown on the part of Congress that suits by the Emergency Fleet Corporation should be brought in its own name; that the discretion or authority to prosecute suits otherwise does not reside elsewhere."

The contention of the plaintiff in error is that in this the court was in error, on the following grounds:

(1) The United States was the real party in interest.

(2) The United States Emergency Fleet Corporation was a governmental arm or agency of the United States.

(3) The Act of Congress of June 5, 1920, known as the Merchant Marine Act or Jones Act transfers to the United States Shipping Board, an admitted governmental agency, all contracts, rights, interest and remedies accruing or to accrue in pursuance of any provision of the Shipping Act of 1916 or the Merchant Marine Act of 1920, and specifically directs that said Board settle, adjust and liquidate all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred upon the President by the Shipping Act of 1916.

The Shipping Act of 1916 (39 U. S. Stat. at Large 728, Comp. Stat. Sec. 8146-A, *et seq.*) is declared by Congress to be "An Act to establish a

> "United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a mer-

> chant marine to meet the requirements of the commerce of the United States with its Territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States; and for other purposes."

The United States Emergency Fleet Corporation, under Section 8146, U. S. Comp. Stat., was formed under the laws of the District of Columbia. The United States Shipping Board was authorized by the act to and did subscribe for the entire stock of the Emergency Fleet Corporation.

The Merchant Marine Act of 1920 (Act of Congress of June 5, 1920), was an act which provided:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and,

in so far as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be obtained."

Under Section 2 of this Act we find certain provisions of the Shipping Act of 1916 repealed.

"(b) The repeal of such Acts or parts of Acts is subject to the following limitations:

"(1) All contracts or agreements lawfully entered into before the passage of this Act under any such Act or part of Act shall be assumed and carried out by the United States Shipping Board, hereinafter called 'the board.'

"(2) All rights, interests, or remedies accruing or to accrue as a result of any such contract or agreement or of any action taken in pursuance of any such Act or parts of Acts shall be in all respects as valid, and may be exercised and enforced in like manner, subject to the provisions of subdivision (c) of this section, as if this Act had not been passed.

* * * * * * *

"(c) As soon as practicable after the passage of this Act the board shall adjust, settle, and liquidate all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President by any such

> Act or parts of Acts; and for this purpose the board, instead of the President, shall have and exercise any of such powers and duties relating to the determination and payment of just compensation: *Provided,* That any person dissatisfied with any decision of the board shall have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the Acts hereby repealed."

These provisions, quoted from the Acts of 1916 and 1920, clearly show that the United States is the real party in interest in this case. It goes even further than that and shows that the Emergency Fleet Corporation was exercising governmental functions in that it was developing and creating a naval reserve and a naval auxiliary, and that, in the words of Congress, it was necessary for the national defense to serve as a naval and military auxiliary in time of war or national emergency.

Section 179 of Remington & Ballinger's Code of Washington, provides:

> "Every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law."

Section 914, of the United States Revised Statutes, Section 1537 of the Compiled Statutes, provides:

> "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the (circuit and) district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such (circuit or) district courts are held, any rule of the court to the contrary notwithstanding."

We submit that the United States, under the above Acts of Congress and the Washington Statutes was the real party in interest and was the proper party plaintiff in this action, and that there was no defect of parties plaintiff, and that under the Acts of 1916 and 1920 the Emergency Fleet Corporation was a governmental agency acting for and on behalf of the United States.

It was said by Chief Justice Marshall, in the *Dartmouth College* case (4 Wheat. 518; 4 Legal Ed. 629), "to determine the character of a corporation the beneficial purposes to which the property of the corporation is to be used may be considered."

It is a matter of common knowledge that the United States Emergency Fleet Corporation was formed for the purpose of operating naval and military transports during the emergency with the

war with Germany; in fact, it might be said that the sole purpose of its organization was to assist in dispatching and transporting to Europe supplies and men to carry on the war. It cannot be denied that this was a governmental function.

The Supreme Court in the *Lake Monroe* (250 U. S. 246; 63 L. Ed. 962), says:

> "But at the time of the emergency provision of June 15, 1917, the Shipping Board had been established as a public commission, with broad administrative powers, and subject to definite restrictions, and the Fleet Corporation had been created as its agency, financed with public funds. The emergency shipping legislation evidently was enacted in the expectation that the President would employ the Shipping Board and the Fleet Corporation as its agencies to exercise the new powers, for the Fleet Corporation was mentioned in the act, and it was known to be but an arm of the Board."

In the case of *Ballaine v. Alaska Northern Railway Company*, 259 Fed. 183, the evidence showed that the United States owned not only the property of the Alaska Northern Railway Company, but all its stocks and bonds, and this court found that while the United States was the owner, the corporation was its agent for governmental and public purposes,

and held that without the consent of the government the corporation could not be sued; the court saying:

> "The Act of March 12, 1914, c. 37, heretofore cited, which authorizes the President to locate, construct, and operate railroads in Alaska, expressly provides that the Alaska railroad is for the settlement of public lands and for transportation of coal for the army and navy, for the transportation of troops, arms, munitions of war, the mails, and for 'other governmental and public uses,' and to transport passengers and property. The act (section 4) also confers authority upon the President, through such agents as he may appoint or employ, to do all necessary acts, in addition to those specially authorized, to enable him to accomplish the purposes of the act. By section 1 the President is authorized to purchase or acquire other railroads to carry out the purposes of the act, and to employ officers and agents in order to accomplish the purpose of the legislation. Taking all these provisions together, they plainly show that the United States, in acquiring the stocks and bonds and property of the Alaska Northern Railway Company, acted in its sovereign capacity, and in exercising entire control, possession, ownership, and management, has merely employed the corporate organization as an agency through which to execute the purposes of the statute."

This court in that case cited as authority, *California v. Pacific Railway Company*, 127 U. S. 1,

32 L. Ed. 150; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 38 L. Ed. 808, and *Indiana v. United States*, 148 U. S. 148, 37 L. Ed. 401, all of which hold that Congress can create corporations as the appropriate means of executing the powers of government.

In *Sloan Shipyards Corporation v. United States Shipping Board Emergency Fleet Corporation*, 268 Fed. 624, Judge Neterer, in a very learned and exhaustive opinion, held that the United States was the real party in interest:

> "The intent of the Congress in the agency employed and the directions given, the provisions of the act, and legislation with relation thereto, appear to be conclusive that the United States acted in its sovereign capacity, and in exercising entire control, possession, ownership, and management it has merely employed the corporate organization of its own creation so far as applicable as an instrumentality or 'arm,' with which to execute the purposes of this Statute, and in so doing it was not divested of its sovereignty."

Under the above citations it would seem that there can be no question but the United States was the real party in interest and was the proper party plaintiff, and that the Emergency Fleet Corporation

was but an instrumentality or arm through which the United States acted in its sovereign capacity, and with which the United States carried out the intention of Congress.

Section 2, subdivision (b) of the Act of Congress of June 5, 1920, known as the Merchant Marine Act, repealed certain emergency shipping legislation, and in the sections quoted above transferred to the United States Shipping Board all contracts, agreements, rights, interests and remedies accruing or to accrue by reason of any actions taken in pursuance of the Act of 1916. It went further, and provides that said board shall adjust, settle and liquidate all matters pertaining to any action arising out of or pursuant to said act.

There can be no argument that the United States Shipping Board is a governmental agency functioning for and on behalf of the United States. This action was brought in December, 1920, nearly six months after the Merchant Marine Act was passed, and it would seem that it would need no extended argument to the proposition that the United States was the real party in interest and was the proper party plaintiff.

We submit that the judgment of the trial court

should be reversed, with directions to overrule the demurrer.

Respectfully submitted,

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